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September 22, 2006

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J. Duane Pugh, Jr.
Acting Assistant General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

AOR 2006-32

Dear Mr. Pugh:

This will respond to your letter of September 14, 2006 asking us to change several of the questions we asked in our August 25, 2006 Advisory Opinion Request on behalf of Progress for America Voter Fund ("PFAVF") and Progress for America ("PFA"). You noted in our telephone conversation of September 14 that our failure to change the AOR's facts and questions as you requested would mean that the AOR was "not complete" and would not be considered by the Commission.

We appreciate your consideration in discussing this with us and in marking the letter with the Commission's suggested changes. We have modified the letter as you requested and provide the information you seek. *See Attached*. We do this because the paucity of guidance from the Commission in this area and the proclivity of some groups to file complaints combine to make gaining guidance from the Commission mandatory before PFAVF and PFA can exercise their First Amendment rights to enter the issues debate, despite the chill this places on core First Amendment principles. However, we note that requiring us to change our letter amounts to the government telling a private group to alter what it wants to say based on what the government wants, or does not want, to answer.

In response to your first question, the success of PFAVF's and PFA's fundraising – and therefore its budgets – is not known at this time. The fundraising for both organizations is ongoing but chilled by the lack of clarity in this area, so that the size of budgets is unknown. Indeed, the success of the organizations' fundraising is largely dependent on their ability to utilize as soon as possible the proposed fundraising communications set forth in the AOR.

As stated in the August 25 AOR, PFAVF and PFA both plan to spend about 70 percent of their budgets by November 4, 2006. If deemed permissible, the vast bulk of these funds will go to communicating their positions on issues of public importance to the general public, as described

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in the AOR. The uncertainty over what speech the FEC believes is actionable combined with PFAVF's and PFA's desire to not violate the law or become entangled in protracted enforcement actions is having an impact on when and how the groups can and will spend their funds. This cloud is also dampening fundraising.

The bulk of the funds spent by November 4 will be spent on broadcast communications, as ultimately permitted by the Commission. If PFAVF and PFA felt they could disseminate all the communications inquired about in this AOR without becoming subject to a "case by case," "holistic", judgment on whether a communication meets a still unclear, and therefore subjective, standard ("express advocacy", "promote, attack, support, oppose," "attempt to influence an election"), it would spend about 75 percent of the funds on television, and the remainder on a combination of direct mail and internet communications. The PFAVF communications would name specific public officials (who might also be candidates for federal office). The PFA communications would not mention any public officials or political parties.

You ask the percentage of spending that will go towards proposed communications 1-10 and 11-15. With respect to these communications, we seek guidance for both the 527 entity (PFAVF) and the 501(c) (4) (PFA). This response distinguishes between the two groups since they have separate budgets. For PFAVF, communications 1 and 2 are television, and are now budgeted for about 76 percent of the amount to be spent. Communications 7 and 8 are direct mail, budgeted at about 5 percent. The emails of the other communications are about 1.5 percent. The website expense is about .5 percent. Communications 10, 11, 12, 14 and 15 are handouts and solicitation cards with minimal printing costs. The rest will be spent on administrative costs, including personnel.

For PFA, the August 25 AOR described a PFA ad that is part of the 70 percent of funds that will be spent by November 4. This ad and others like it (with no mention of any responsible public official in them) will make up the bulk of those expenditures, about 70 percent of the funds spent by November 4. Email communications and direct mail backing up those ads, like planned communications 4 and 6, are budgeted for 18 percent of PFA's funds spent by November 4. The rest will be spent on administrative costs, including personnel.

The funds not spent by November 4 by both organizations will go towards communications and administrative costs through the end of the year (including the possibility of messages aimed at issues considered by a lame duck session of Congress). Both organizations also wish to be able to carry funds over to the 2007 calendar to fund the efforts described in the August 25 AOR, if permitted by the Commission.

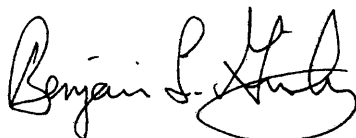
In response to your second question, the AOR asks simply if any of those statements, in and of themselves or cumulatively, are sufficient to trigger major purpose status. We ask simply about the actual words in those statements. You also ask how planned communication # 1 will be used

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as an internet communication or telephone script. As for an internet communication, both groups plan to take the communications they broadcast and both email them to their large email lists and put them on the internet at their and other publicly available websites for others to view. As for phones, the script of phone calls would have a live or recorded voice (depending on state requirements), ask people to listen to audio that follows, view it on the internet if they wished, and then send funds to help keep it on the air longer and in more locations. There is, at this time, no further design on the website other than what is asked about, since further design of the site hinges on the Commission's answer to this question.

Sincerely,

A handwritten signature in black ink, appearing to read "Benjamin L. Ginsberg". The signature is fluid and cursive, with the last name "Ginsberg" being more prominent and having a large, sweeping underline.

Benjamin L. Ginsberg

cc: Chairman Michael E. Toner
Vice Chairman Robert D. Lenhard
Commissioner David M. Mason
Commissioner Hans A. von Spakovsky
Commissioner Steven T. Walther
Commissioner Ellen L. Weintraub

August 25, 2006

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Dear Mr. Norton:

As permitted by Section 437f of Title 2 of the United States Code and Part 112 of Title 11 of the Code of Federal Regulations, please accept on behalf of our clients Progress for America Voter Fund ("PFAVF") and Progress for America, Inc. ("PFA") an Advisory Opinion Request concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Federal Election Commission ("FEC") regulations, to the specific proposed activities described below.

We submit this request in light of the Commission's 2004 decision not to promulgate regulations defining "political committee," because "[t]he Commission has been applying [the previous] construct for many years without additional regulatory definitions, and it will continue to do so in the future." *Political Committee Status, Definition of Contribution, and Allocation for Separate, Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056, 68065 (Nov. 23, 2004). Rather, the Commission announced that it will evaluate an organization's activity on a case-by-case basis to determine if it triggers the definition. See *Shays v. Federal Election Commission*, 424 F. Supp.2d 100, 104 & 112-113 (D.D.C. 2006).

Within this framework, PFAVF and PFA respectfully seek the Commission's guidance regarding the legality of the communications enumerated below. While the planned communications described in this request reflect the organizations' current intentions, PFAVF and PFA want to be in full compliance with all applicable laws and, accordingly, are delaying the described activity until receiving guidance from the Commission so they can be in full compliance.

FACTUAL BACKGROUND

PFAVF is an I.R.C. § 527 organization dedicated to keeping the issue record straight on the campaign trail and serving as a "Political Truth Squad." It accepts funds from individuals and corporations and maintains segregated accounts for individual and corporate funds. It files

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reports of its contributions and expenditures as required with the Internal Revenue Service. It does not file reports as a political committee with the FEC. PFA is an issue advocacy/grassroots I.R.C. § 501(c)(4) nonprofit corporation committed to representing a diverse coalition of concerned citizens, businesses, nonprofit organizations and community leaders who promote public policies designed to improve the lives of every American. It accepts funds from individuals and corporations. It files the required reports with the IRS.

Both organizations plan to fund communications via broadcast, cable, direct mail, and personal conversations and meetings during the fall of 2006, as well as throughout 2007, 2008, and beyond. Both organizations wish to conduct all activities only within the confines of the law as detailed in the Commission's response to this Request. PFAVF intends to fund its communications with donations from individuals and corporations. PFAVF communications meeting the 11 C.F.R. § 100.29 definition of "electioneering communication" will be funded solely with funds contributed by individuals, as required by law. PFA communications are designed to not fall under the 11 C.F.R. § 100.29 definition of "electioneering communication" and it does not engage in "federal election activity," as defined by 11 C.F.R. § 100.24. Both organizations will observe the rules prohibiting "coordination" as set forth in 11 C.F.R. § 109.21.

Both PFAVF and PFA find that the issues debate today is most often joined near elections, when Americans are most focused on the issues and the discussion of different points of view. As such, PFAVF and PFA wish to be able to disseminate their messages in jurisdictions where the debate is most focused, and that most often comes in the context of high-interest elections. Often the chief spokespersons and symbols of the opposing points of view on issues of public importance are also candidates for Federal office.¹ PFAVF and PFA seek this Advisory Opinion for guidance on whether the specific mention of these symbols/leaders/candidates, even in the context of the issues debate, automatically violates the Act or Commission Regulations.

¹ As the United States Supreme Court has explained: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of government affairs. This of course includes *discussion of candidates*, structures and forms of government, the manner in which government is operated, and all such matters relating to the political process." *Mills v Alabama*, 384 U.S. 214, 218-19 (1966) (emphasis added).

The Court further explained in *Buckley v Valeo*, 424 U.S. 1, 42 (1976) that "... the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."

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QUESTIONS CONCERNING "EXPENDITURES"

Please consider these two Planned Communications in each of the three Factual Settings that follow. Each communication will mention a series of national leaders in the current debate on issues of public importance who are also candidates for federal office in the next election. The communications will go on a mass scale (greater than 50,000 per jurisdiction) to the public at large in jurisdictions including those in which the national leaders are also candidates on the ballot for the next election.

As to each of the factual settings, do either of the planned communications below constitute an "expenditure" pursuant to the Act for purposes of determining political committee status? If so, what specific language in the planned communication triggers the Act?

As to each of the factual settings, does either of the planned communications below expressly advocate that recipients of the communication vote for, campaign for, or contribute to a clearly identified candidate for federal office? If so, what specific language in the planned communication triggers the Act?

Planned Communication # 1:

[Four veterans from the frontlines of Iraq and Afghanistan speaking:] "[Federal Candidate X] will be the best man to lead us in the war against terror. [Federal candidate X] sticks to his policies. I'd ask [Federal candidate Y, who is X's opponent] why would you vote to go to war but vote not to support troops over there? I don't think that [Federal candidate Y] has what it takes. He doesn't have the resolve. Progress for America Voter Fund is responsible for the content of this message."

Planned Communication # 2:

"Why do we fight? Years of defense and intelligence cuts left us vulnerable. We fight now because America is under attack. Positions are clear. [Federal candidate X], who fights to defeat terrorists before they can attack again. Or one of the nation's most liberal senators with a longstanding record of supporting defense and intelligence cuts. The war is against terror. And [Federal candidate X] has the strength and courage to lead us to victory. Progress for America Voter Fund is responsible for the content of this ad."

Factual Setting # 1: During 2006, 2007, and 2008, both inside and outside the temporal "windows" established in § 100.29, PFAVF (the section 527 organization) intends to broadcast

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these communications on television, radio, and satellite with funds raised only from individuals in amounts greater than the limits in the FECA ("individual unlimited funds").

Factual Setting #2: During 2006, 2007, and 2008, PFAVF intends to finance these communications through mail, phones, and the internet, both inside and outside the window, with funds from corporations or with funds from corporations mixed with individual unlimited funds.

Factual Setting #3: During 2007 and 2008, PFA (the 501(c)(4)) intends to finance these communications (except that the disclaimer will state "Progress for America") for broadcast on television, radio, and satellite outside § 100.29's temporal window and for mail, phones, and the internet, both inside and outside the window, with funds from corporations or funds from corporations mixed with individual unlimited funds.

QUESTIONS CONCERNING "CONTRIBUTIONS"

Would any funds received in response to the following communications/solicitations constitute "contributions" pursuant to the Act for purposes of determining political committee status? If so, what specific language in the planned communication triggers the Act?

Planned Communication # 3:

During the fall of 2006, PFAVF intends to distribute the following communication via email both nationwide and in the State where Federal candidate Y, a leading spokesman for conservative causes, is on the ballot. In 2007 and 2008, PFAVF intends to distribute the same communication nationwide discussing issues of public importance in the current debate and mentioning the views of a leading spokesman for conservative causes who will also be a candidate for President (Federal candidate Z):

"We urgently need your help to level the playing field! As you know, a vast network of liberal 527 organizations are outspending [Federal candidate Y/Federal candidate Z] on television ads by a significant margin. These extremists have already raised more than \$20 million in a relentlessly negative and intensely personal assault against [Federal candidate Y/Federal candidate Z]'s agenda, especially his leadership in the war on terrorism. [Liberal donor S] has given these liberal groups more than \$3 million."

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Planned Communication # 4:

In 2007 and 2008, PFA (the 501(c)(4)) intends to distribute by email the same message as in Communication # 3 above, where Federal candidate Y is a leading spokesman for conservative causes and is a Presidential candidate.

Planned Communication # 5:

During the fall of 2006, PFAVF (the section 527 organization) plans, based on the IRS filings to date, to distribute the following communication via email both nationwide and in the state where Senate candidate Y, a leading spokesman for conservative causes, is on the ballot:

"NEWSFLASH: Media Analysis Shows Liberals Outspending [Senate candidate Y] 2 to 1 in key areas of the State! Did you know that recently Liberals have put on a huge push with their union and fat-cat Liberal donors to fund their posse of Liberal 527 political organizations to attack [Senate candidate Y], spent more than \$3 million bankrolling harsh attack ads against [Senate candidate Y], and dispatched thousands of paid activists and union organizers to register anti-[Senate candidate Y] voters in key battleground areas of the State. We need YOUR help to raise \$1 million per week for the rest of the year in order to help offset the Liberals' spending advantage. PFAVF already has the [Senate candidate X, Senate candidate Y's opponent, whose views against the war are being heavily touted by the liberal Left as an example of how to debate the War in Iraq] campaign on the run, but we need YOUR help to expand our efforts to include additional battleground areas of the State and pay for additional TV ads... CONTRIBUTE NOW TO KEEP [SENATE CANDIDATE X] CHASING US!"

Planned Communication # 6:

During the fall of 2006, PFA (the 501(c)(4) organization) plans, based on the IRS filings to date, to distribute the following communication via email both nationwide and in the state where Senate candidate Y, a leading spokesman for conservative causes, is on the ballot:

"NEWSFLASH: Media Analysis Shows Liberals Outspending [Senate candidate Y] 2 to 1 in key areas of the State! Did you know that recently Liberals have put on a huge push with their union and fat-cat Liberal donors to fund their posse of Liberal 527 political organizations to attack [Senate candidate Y], spent more than \$3 million bankrolling harsh attack ads against [Senate candidate Y], and dispatched thousands of paid activists and union organizers to register anti-[Senate candidate Y] voters in key battleground areas of the State. We need YOUR help to raise \$1 million per week for the rest of the year in order to help offset the Liberals' spending advantage. PFA already has the [Senate candidate X, Senate candidate Y's opponent, whose

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views against the war are being heavily touted by the liberal Left as an example of how to debate the War in Iraq] campaign on the run, but we need YOUR help to expand our efforts to include additional battleground areas of the State and pay for additional mail and phone programs... **CONTRIBUTE NOW TO KEEP [SENATE CANDIDATE X] CHASING US!"**

Planned Communication # 7:

Beginning in March 2008, PFAVF intends to distribute the following communication nationwide via direct mail:

"We've reserved TV time in key states including Florida, Iowa, Minnesota, Missouri, Nevada, New Mexico, Ohio, Pennsylvania and Wisconsin. But to truly have an impact that will tip the scales of public opinion on these issues, we need to saturate the airwaves in these states and also move into six additional states including Arkansas, Colorado, New Hampshire, New Jersey, Washington and West Virginia. So please, help us promote [candidate for president Y]'s agenda with the greatest possible strength between now and November 3rd."

Planned Communication # 8:

During the fall of 2006, PFAVF intends to distribute the following communication via direct mail both nationwide and to more than 500 persons in [State A]:

"Please, help us promote [Senate candidate Y]'s agenda in [State A] with the greatest possible strength between now and November 1st. Your generous support will help us raise the \$1 million we need to dominate the [State A] airwaves and have a crucial impact on public opinion."

Planned Communication # 9:

Beginning in mid-November 2006 and continuing through November 2008, PFAVF intends to design its website to include the following message:

"PFAVF is a conservative issues advocacy organization dedicated to keeping the issue record straight on the campaign trail and serving as a 'Political Truth Squad.'"

Immediately adjacent to this message, PFAVF intends to place a solicitation for contributions to pay for television advertisements, accompanied by a picture of a leading spokesman for conservative positions in the issues debate, who is also a candidate for federal office in 2008, on a television screen. The same picture of the conservative/leader federal candidate will appear on a contribution website where PFAVF will state specifically that donors' contributions will "help

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launch TV ads.” The website will state that the funds received will be used to fund “TV ads” supporting the conservative leader/federal candidate’s policies “on the campaign trail.”

Planned Communication # 10:

In private conversations and meetings during the fall of 2006, and beginning again in 2008, PFAVF intends to use the following language to invite potential donors to “briefings”:

“Your participation is critical to our success in November! [Liberal donor S, explaining why he has given extensively to liberal 527 organizations] says that he would give until it hurt to beat [Federal candidate Y], and we cannot let that happen!”

QUESTIONS CONCERNING “MAJOR PURPOSE”

For 2006, PFAVF and PFA are both operating on a calendar year budget and each plans to spend 70 percent its budget before November 4, 2006. Does this spending and budget impute to either PFAVF or PFA a major purpose sufficient to regulate either organization as a “political committee” under the Act if it undertakes the plans set forth in Planned Communications 11-15 below?

Do any of the following PFAVF and PFA planned communications, singularly or cumulatively, impute to the organization a major purpose sufficient to regulate that organization as a “political committee” under the Act? If so, what specific language in the planned communication triggers the Act?

Planned Communication # 11:

A PFAVF press release and mission statement, distributed in the fall of 2006 for use through at least November 2008, that states:

“Although PFA has worked since 2001 to advance the conservative agenda, the establishment and operation of the PFA Voter Fund provides us the additional flexibility we need to affect the political process.”

Planned Communication # 12:

A PFAVF written communication, distributed in the fall of 2006 for use through at least November 2008, that states:

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"PFAVF is a conservative issue advocacy organization dedicated to keeping the issue record straight on the campaign trail and serving as a 'Political Truth Squad.' With your help, PFAVF will rebut the liberal 527 committees and level the playing field on television in the battleground states."

Planned Communication # 13:

A PFA written communication, distributed in the fall of 2006 for use through at least November 2008, that states:

"PFA is a conservative social welfare organization dedicated to keeping the issue record straight in the public debate as it unfolds on the campaign trail and serving as a 'Truth Squad.' With your help, PFA will rebut the liberal special interest committees and level the playing field in the battleground states."

Planned Communication # 14:

Materials, which PFAVF intends to distribute before the end of the 2006 election and again before the 2008 election, wherein PFAVF identifies the three goals of its media campaign as:

"1. Level the playing field on ads - it may not be possible to out raise even [Liberal Donor S] alone, but the PFA Voter Fund must try to reduce the lopsided advertising advantage the Democratic 527's have on the campaign trail today.

"2. Reinforce the message of conservatives across the nation - we have messages we know will work and energize the base; we just need the resources to deliver these messages.

"3. Become a major factor in the battleground states, and also advertise on targeted national cable networks. To effectively air one thirty-second TV ad in every battleground state will cost over \$5 million per week.

"We believe we can play a critical role in the following eleven states (Arizona, Florida, Iowa, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Pennsylvania, Wisconsin). To do this we must be on the air from Labor Day straight through to the election."

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Planned Communication # 15:

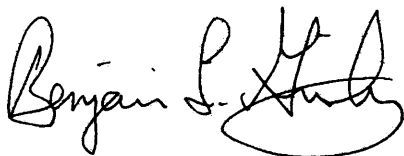
In an email communication sent in the fall of 2006 and again in the fall of 2008, in which PFAVF will state that it:

“continues to win the 527 battle against liberal organizations like MoveOn.org, The September Fund, Majority Action, the Senate Majority Project, Americans Coming Together and others. PFAVF is outspending [Liberal Donor S] and dozens of liberal 527 groups on television for the month of October in key states across the country. But we still have a long way to go to increase support for [federal candidate Y]’s agenda and expose [Federal candidate Z]’s record as the most liberal member of the U.S. Senate!”

CONCLUSION

PFAVF and PFA are grateful for the Commission’s guidance on the matters above and will adjust our plans pursuant to the Commission’s response to this inquiry. We appreciate your assistance in understanding our responsibilities under the law.

Sincerely,

A handwritten signature in black ink, appearing to read "Benjamin L. Ginsberg". The signature is fluid and cursive, with the last name "Ginsberg" being more prominent and having a large, sweeping flourish at the end.

Benjamin L. Ginsberg